Medical Responsibility and Malpractice:

AN ADDRESS

DELIVERED AT ALBANY BEFORE THE

Medical Society of the State of New York,

At its Sixty-Sixth Annual Meeting,

FEBRUARY 7, 1872.

By WILLIAM C. WEY, M. D.,
PRESIDENT OF THE SOCIETY.

ALBANY:
THE ARGUS COMPANY, PRINTERS.
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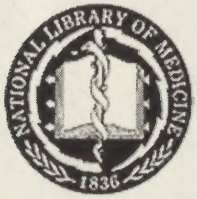

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ADDRESS.

Gentlemen of the Society:

In assuming the rights and privileges of medicine or the law, certain obligations are also assumed, which, in common with individual responsibility in the affairs of ordinary life, are immediately dependent upon the proper foundation and government of society. These obligations, or many of them, have been evolved in the gradual progress of civilization, as society has arisen out of confusion and disorder and taken the form of law and order. What at one time seemed crude and unsettled in theory, practice and individual judgment, under the growth and leveling influence of the force and power of society and the State, has taken specific form and direction, until it has finally become written authority, sustained by the decrees of formal law. This process has been necessarily slow and tedious. It has expanded and developed as the ages of the world have measured out their revolutions. It embraces the reciprocal relations of men in communities, and the share and portion which each man sustains to his neighbor in the personal affairs of life, and the responsibilities which attach to them collectively under prescribed forms of social organization. In other words, the association of people in communities leads to such mutual advantages that mutual liabilities and responsibilities are necessarily engendered. The mixed nature of such communities, grouped and rendered coherent under the form of professional, industrial and mechanical employments, causes the pursuit or business to which each representative has devoted his time and talents to be directly obedient to the laws and customs by which he may be surrounded. At the same time, the nature of the compact bestows on every man, in whatever sphere he may legitimately exercise his skill or genius, certain inalienable rights; the right to pursue a profession, under just restrictions—the right to conduct a trade or to engage in manufacture, whose every detail is subject to wisely-formed laws,—the rights of commerce, including banking, insurance and exchange, according to the demands and necessity of the age and period, secured by the

shield and protection of organized and individual interests. It is the principle that so often and under such conflicting circumstances in the history of nations has been asserted and maintained, that each individual has rights under the civil code which cannot be taken from him, in the use and enjoyment of which he possesses immunities, however humble he may be, which belong, in equal proportion, to the most privileged member of the commonwealth. In this respect the most privileged, by reason of education, position and wealth, is a citizen and nothing more. His wealth, mental endowments and social state, while adding immeasurably to his power and usefulness, in no sense diminish his individual responsibility, but materially increase it. As he has attained, by the exercise of this combination of advantages, multiplied capacity for organizing and governing industrial, mechanical and many other extended operations, and for influencing and directing the minds as well as the productive bodies of his fellow-men, it is evident that his obligations are increased with the varied and expanded character of his interests in community. In this way only does his individual responsibility as a member of society extend beyond the personal responsibility of men whose operations and employments are less numerous and diversified. In the varied relations to which I have referred, he is held to increasingly strict accountability, as if he possessed the faculty of multiplying himself into many distinct corporeal forms, each representing a commercial, mechanical or other specific interest. The condition of such a man is illustrated by the members of the body, which are in harmony with and dependent on the commanding influence and integrity of the mind and brain.

In all the ordinary business operations of life, such as buying and selling, the arts and manufactures, and the conveyance of property, the legal responsibility of persons engaged in these acts appears to be settled and understood, under the form of special contracts and engagements, influenced and governed by the usage and customs of society. The physician and his patient, as well as the lawyer and his client, enter into obligations, in one sense precisely the same as those that regulate the commercial relations of business men. In another sense the obligation is so entirely unlike, that professional skill and knowledge, in being brought in juxtaposition with petroleum, cattle and salt, experience such a shock as to be driven from seeking to define the distinctive place of legitimate science under the order and direction of legal investigation on one hand, or of claiming exalted position because of confessed superiority on the other.

The profession of medicine insists, with unquestionable authority, upon possessing prerogatives and immunities infinitely above and beyond a purely commercial aspect of bargain and sale, or of employment by a patient under an implied contract to perform ordinary or even extraordinary service. In the position which I have the honor to occupy, and before an audience of enlightened and thinking men, I feel as if I was commissioned to speak clearly and positively on this subject. And yet I do not complain of the lack of justice which this principle of association of the professions and trades in a common responsibility would seem to impose on us. To subserve the great ends and purposes of justice, it is becoming that we should be held to accountability for the faithful performance of our manifold duties. We recognize and appreciate the reasonableness of this necessity in the social compact, and with no purpose of questioning the excellence of the law or our fealty to its course and operations, we have reason, as I propose in the course of my address to show, to complain of a harsh and unjustifiable construction of its spirit and intention, as if, in many cases, it had been made to bear with prejudice and discrimination upon members of our profession.

On the bold and bad men in the ranks of medicine, who, disregarding the attributes of law and the obligations of their calling, commit crimes against nature and against the State, I could look with complacency and witness the utmost infliction of penalties. With this remark I dismiss any further allusion to criminality in connection with the subject of malpractice.

In the most comprehensive meaning of the term, our profession is law abiding. I desire to be understood as referring to educated physicians, who have earned the title through early and well-governed preparation for professional pursuits. Aside from an intuitive desire to conform to every moral as well as every legal requirement, which, though not always born of education and refining associations, are astonishingly modified by them, in the principles and practice of our art we are impelled by a broad and enlightened impulse, to render benefits to the suffering and distressed members of the race. You have seen, in some representative man in medicine, an indwelling power to relieve the most appalling infirmities and abnormities, or to search out and overcome obscure and serious forms of disease. You have observed in what respect and reverence he is held by members of the profession, and by thinking and appreciative as well as by ignorant and thoughtless people. In a worldly or business aspect, his skill and knowledge represent capital. Measured by the same

standard, it should represent large capital, which yields such revenue as makes its possessor rich and powerful, as he is expected to be wise and beneficent. His intellectual capital, as compared with material wealth, cannot be estimated in gold, silver, bonds or other securities. A test of its great worth and wide-spread influence is shown in the universal acknowledgment of such a man's gifts and accomplishments, and his ability and readiness to employ them in the needs of humanity. I do not claim that such service should be gratuitously rendered; I would not think of expecting it. If the laborer is worthy of his hire in a limited measure, surely he is worthy who, with such extended responsibility, assumes such cares and burdens.

Of confessed value in society, a profession like medicine, the law or civil engineering, implies special ability in a particular field of investigation. The prerogative of fitness and devotion to duty in a given direction is attended with additional responsibility, because of the expectation of the many in respect to the merits of the few. This constitutes spontaneous loyalty of the people to the learning and influence of a privileged class, who in turn have it in their power to bestow incalculable advantage in relieving the needs of those who are grouped together in the varied pursuits of life in cities, villages and hamlets, as well as in the waste places of the earth. Thus by seeming necessity, which in itself is law, distinctions in society have been perceived and adopted by the people, and have become such fixed and positive events and incidents as to lead to the adoption of unalterable rules and customs, which have insensibly formed and moulded a system of jurisprudence, by which, as a class and for a specific purpose, we are associated together this day

Any man is privileged to study, and, if found competent, to practice the profession of medicine. He is free to choose for himself, and if at any time he finds that he has not chosen wisely, with the unlimited liberty given by our law, he may abandon one occupation or profession and take up another. It is not uncommon to see a man trained in the Military Academy of the United States, after such experience in the field, on the frontier or as an instructor, as satisfies him that his occupation is not according to his tastes, drift, as if by a natural law, into one of the professions or in a particular department of science or business. Or a man educated for the bar finally enters the ministry, and so on through an unending series of changes, the purpose and destiny of life is achieved in spite of impediments. When he finally adopts a profession or other vocation which falls

within the meaning of the law, and assumes obligations to which allusion has been made, he becomes responsible for the consequences of his acts, the nature of which I propose to consider, as they refer to physicians.

It is not necessary to enter upon an historical recital of the character of the contract between a physician and his patient. It has undergone many modifications in the course of transition from interpretation under the Roman law, down through the sifting process of English ruling and construction, to the more positive and material times in which we live. At one period, in this review of the subject, the services of a physician were regarded in the form of a mandate, and to use the language of Dr. Ordronaux, "a mandate was in its nature always gratuitous, being founded in personal confidence. In this respect it differed from all consensual contracts." The present estimate of the nature of an engagement between a physician and his patient is changed from a mandate into a condition of hire. Under this principle "the civil responsibility and duties of physicians, lawyers, engineers and machinists, ship-builders, brokers and other classes of men whose employment requires them to transact business demanding special skill and knowledge, are the same." (*Elwell.*)

The wisdom of this system or method, while, as I have stated, it is in some degree offensive to medical men and certain specialists, is, notwithstanding, so simple and plain in its details and practical working, and so just withal, that we can interpose no reasonable objection to be tried by it, if we are so unfortunate as to be brought under charge of malpractice, subject, as a matter of necessity and as a right, to the ruling and interpretation of a discriminating and learned judge.

An impression prevails, not alone among the ignorant, that a physician is compelled to render services in every case to which he may be called. Some among you may have heard the declaration angrily made by disappointed friends and messengers of the sick, that means would be employed to compel your attendance where you had positively declined to take part. Such refusal is one of your rights, which you are as free to exercise as the tradesman, who, through caution, or a desire to protect himself, or caprice, or prejudice, declines to sell his goods, or the lawyer who objects to engage in a cause, or the civil engineer who refuses to give advice or personal attention in a matter relating to the construction of a bridge or a railway.

If a physician once assumes the care and responsibility of a case, he is under an obligation, which has the binding force of a carefully-

written contract, to exercise his "best skill and all necessary diligence to carry it to a speedy and successful termination." (*Ordronaux.*) Unless a contract is made between a physician and his patient to accomplish a specific result, the former cannot in any manner be regarded as a warrantor or insurer. He also possesses the right to relinquish a case, on giving notice to that effect to the person or persons chiefly interested in the result. He cannot abruptly terminate his connection with a case, without giving timely notice of his intention to withdraw from its care. Failing thus to give notice will subject him to liability for the consequences of his act, which is held to be a serious form of negligence. If a physician withdraw, as for illustration, in a case of fractured bone during a certain stage of treatment, and his successor is unable to remedy or overcome defects that have occurred in the course of management of the previous attendant, and which ultimately operate to the disadvantage or detriment of the patient, the first practitioner can be held responsible for the results of his errors or want of skill. While the terms of the law are so precise and explicit to direct and govern the acts of a physician, they give the patient liberty, at any moment, in a paroxysm of anger, while suffering pain or during a period of despondency, summarily and perhaps without cause to dismiss his physician.

In case of special contract to effect a cure or to accomplish certain results in the treatment of disease, the parties are mutually under obligations, and may be made mutually liable for failure to perform. The consideration of this particular feature of the compact or bargain between physician and patient brings us so completely and offensively within the domain of empirical practice that I am not disposed to comment upon it, except to quote the ruling in a case of this nature that was tried in the State of Vermont: "If a physician commence attending upon a patient, under a contract that if there is no cure there shall be no pay, he cannot recover for his services or medicines unless he show a performance of the terms of the contract on his part." (*Ordronaux.*) I will add as a corollary the termination of an agreement between a strolling surgeon and a man living near Elmira, whose son suffered from necrosis of the femur, with fistulous openings just above the knee. The contract, prepared by the surgeon, stipulated that for the sum of one hundred dollars, half to be paid on signing and the remainder in three months, at the conclusion of treatment, the dead bone should be removed and the sinuses closed. A day was fixed for the operation, and upon the arrival of the surgeon at the house of the patient, the latter was engaged in hoeing corn in

his garden. After a few words spent in conversation, he took his place on the operating table, chloroform was administered by an inexperienced pupil in dentistry, an incision was made through the fistulous tracts down to the seat of disease, and while in the act of using a semi-circular chisel blade to detach portions of decayed bone, its point slipped and divided the popliteal artery. Immense hemorrhage occurred, which the operator lacked knowledge to arrest, either by compressing or ligating the artery, and he proceeded to amputate the thigh, the patient being kept profoundly under the influence of chloroform. He never returned to consciousness, and died in a few minutes from the combined effects of hemorrhage and chloroform. Two days following, the father of deceased caused a warrant to be served on the surgeon, to recover the money paid on the contract. Failing to procure bail, if the surgeon refused to pay, would subject him to imprisonment. The service of the paper was made on the street, near the office of the surgeon, who asked the privilege of going to his sleeping room for a short time. On seeking him, he was found by the sheriff lying on his bed, breathing faintly, and almost immediately expired, from the effects of prussic acid.

Professional service, whether rendered by a physician, a lawyer or an engineer, implies that which is not always taken into account with respect to the arts and trades, that particular skill and knowledge are associated with the contract or undertaking. If a physician offers his services to the public, he announces, with the force of a proclamation, that he is learned in the art he professes, in which he will exercise such ordinary skill as is possessed and employed by those who are engaged in the same occupation. Ordinary skill, as Dr. Ordronaux says, "is the lowest standard of capacity tolerated in the law."

It is not necessary that a physician should make known to the world his business by means of a sign, advertisement or other method of attracting attention to his calling. The fact that he is known among men and employed in the capacity of a physician is evidence of responsibility in his profession.

The principle of responsibility, in all cases in which the question of malpractice has been considered by courts and by writers on the subject, has been made to depend on the skill of the physician charged with the offence. A distinction has been clearly and justly established between common or ordinary skill and uncommon or extraordinary skill. Ordinary skill is such as is possessed and practiced by the profession generally in the common experience of life. Extraordinary skill is an attribute of few only in the profession, as compared with

the many; upon such exceptional men is laid a large share and a high degree of responsibility. It seems doubtful, in scrutinizing this subject, if a surgeon who enjoys extraordinary skill can properly be held to increased accountability, in view of accumulated decisions in the books in regard to skill alone. The following language was used in a recent case in the State of Maine: "This rule," referring to requisite skill and knowledge, "does not require the possession of the highest or even the average skill, knowledge or experience, but only such as will enable them" (the physicians) "to treat the case understandingly and safely." (*Ordronaux.*)

It is a nice question to define the peculiar significance of skill as it relates to responsibility, when not in the highest nor in an average degree is it required to govern professional acts. To assume liability because of skill, knowledge and experience confessedly below the average possessed by the profession, is to reduce the standard of medical requirements to such an inferior plane that they cease to be reputable. A degree of skill below the average in a profession ceases to be skill and becomes ignorance, and it is not easy to perceive in what manner such imperfect knowledge can be accounted sufficient "to treat the case understandingly and safely."

This doctrine, however strange it may at first sight appear to members of our profession, is really the principle on which the courts have nearly always adjudged the degree of skill to which we shall be held responsible. This is a charitable if not at all times an enlightened construction of the meaning of the words *ordinary skill*, and affords additional proof of the justice of the law which prescribes and directs our professional responsibility. Men of distinguished skill in medicine need never shrink from being judged by this rule; indeed, according to the theory which it suggests and the practice which it sanctions, malpractice with them is well-nigh impossible. A skillful physician is expected, nevertheless, to devote to a case more than common skill, as skill is estimated among medical men as they are found in community. The fact that he is employed in a case because he enjoys reputation and is conceded to possess superior knowledge, implies that he will not exercise common or ordinary skill, but the whole force and strength of his ability. Less than this would change his position, as well as responsibility, from high reputation and acknowledged skill to the average of both reputation and skill in the profession, and consequently diminished liability.

Skill should be measured by the locality in which it is exercised, in addition to the advantages and opportunities of its possessor. This

estimate of skill has undoubtedly been considered by courts in holding physicians to account for alleged malpractice, and in this way we are enabled to reconcile the otherwise conflicting character of the principles of law by which such cases have been governed. If in one situation and under a particular train of circumstances not even the average of skill, knowledge and experience are required, which I doubt not is true, and the court thus instructs a jury, in another locality, influenced by diverse surroundings, "in judging of the degree of skill which he (the physician) contracts to bring to the service of his patient, regard is to be had to the advanced state of the profession at the time." (*Haine* v. *Reese.*)

This dogma takes note of the progress of medical science, and requires of the profession such familiarity with its literature and study and practice as will enable its followers to acquit themselves with credit and honor when trial is made of their skill. Governed by such an enlightened opinion of the dignity of our profession, and the moral and legal responsibility of its members, we can appreciate with what contempt a court would reject the testimony of a witness who declared that on setting out to engage in a particular line of surgical duty to which he had been assigned, he critically examined several late works on the subject, and found in them no principles or recommendations in practice that he had not learned more than thirty years before, adding, almost in the same sentence, that except on the occasion which called him to testify, and while in the court-room, he had never before heard of such authorities in the profession as Gross and Frank Hamilton, although he had read carefully Hamilton on Purgatives.

In addition to skill, a physician is required to bring other qualities of fitness and excellence to the discharge of his professional duty. Skill may take in at a glance the present conspicuous or hidden peculiarities, as well as the continued progress of a case. It may be faultless in its estimate concerning diagnosis, prognosis and the appearances to be found after death, and yet fail to exercise such diligence and care as will most speedily and safely insure the recovery of the patient from an injury, an operation or a specific form of disease. It has been said that an honest man is always under oath. In the same sense a physician is under such moral obligation to his patient as forbids inattention and consequently lack of care. The word *care*, unless qualified by the adjective "reasonable," is so vague in its purport as to be impotent to convey the literal significance of responsibility. Judge Story says, "different things may require very different care. The

care required in building a common door-way is quite different from that required in raising a marble pillar." (*Elwell.*) And Elwell very pertinently points out the differing degrees of skill called for in the treatment of iritis and rheumatism. The first disease, involving an exceedingly delicate structure, whose integrity is essential to vision, undergoes rapid and disorganizing changes, which can only be prevented by prompt and intelligent treatment; while rheumatism, self-limited and tedious, runs to its termination by gradually succeeding stages, and does not call for active interference. In the treatment of iritis the practitioner must exercise quick, ready and available knowledge; in the treatment of rheumatism time is given, if required, carefully to study the peculiarities of the affection and mark out a course of procedure.

A physician is under a degree of obligation to his patient, which cannot be made to depend on the fact that he expects to be paid for his services. The circumstance that he, from among many physicians, has been selected at a time of suffering and emergency, denotes faith and trust on one hand, which must be met and returned by devotion and faithful performance of duty on the other. If this principle was more thoroughly and conscientiously considered, it would ease the minds of physicians of a vast burden of doubt and distrust. It should be appreciated by the members of our profession in such a spirit of truth and candor as will make the reciprocal relations of attendant and attended entirely confidential and unselfish. Our Code of Ethics, so catholic and comprehensive in its scope and purpose, contemplates this idea when it refers to the greatness of the mission of the physician, "and the responsibility he habitually incurs in its discharge;" to which are added the expressive words, "every case should be treated with attention, steadiness and humanity."

The words "best judgment" are frequently used in connection with skill, diligence and care, in measuring the degree of responsibility of a physician. Though differing from those three requisites in effect and meaning in some unimportant features, in another sense skill and judgment are synonymous terms, and have been used indifferently in legal phraseology. For instance, in *Haine* v. *Reese*, tried in Philadelphia, in November, 1870, before Judge Thayer, that learned authority held as follows: "On the part of the patient, it is his duty to conform to the necessary prescriptions and treatment, if they be such as a surgeon or physician of ordinary skill and care would adopt or sanction." Here you will observe that the "necessary prescriptions and treatment" include the measures prompted and suggested by the

skill and care of the medical man; in other words, such perscriptions and treatment as are indicated by his judgment of the demands and necessities of the case. And we may ask what directs his judgment? Evidently, skill and knowledge. And so closely are these two qualities interwoven with the mental composition of the man as to produce an attribute which governs and controls his thoughts and actions; restraining from impulse, prompt to advise and wise to take advantage of opportunity, and to indicate measures for speedily and safely rescuing and delivering his patient from pressing necessity.

In contrast with this view of the construction of the words *best judgment*, is the fact that a surgeon was held liable in heavy damages for not amputating a thigh nearer the hip-joint than the place selected for the operation; not, as the court held, because he was not a good surgeon, for that was proved; nor that the operation was not skillfully performed, for that was admitted, but because an error of judgment was committed in choosing the place of amputation. As Elwell justly remarks, in noticing this case, "the court should have held that the surgeon was not responsible for mere errors of judgment; then there would have been no such verdict."

Disconnecting the words "best judgment" from their actual meaning under the law, skill, diligence and care may belong in an eminent degree to a physician who is deficient in judgment. He may possess ability to discriminate disease in such a manner and under such trying circumstances as will prove his title to be called skillful among his associates—even pre-eminently skillful. He may also exercise such care and diligence in the treatment of disease as evince aroused and awakened zeal and interest, and yet so manifestly lack judgment as to make choice of unsuitable remedies, and allow the time for specific interference or for the performance of an operation to pass hopelessly by. Such instances will doubtless rise up in your memory, as they do in mine, and an anomaly is presented of skill and knowledge proving exact and applicable in detecting disease, yet, unsupported by good judgment, being comparatively powerless to prevent or abate its progress.

If by reason of idiosyncracy depending on the constitution of the human mind, certain attributes for the direction and government of the individual are lacking, while others are sufficiently or perhaps unduly exercised, in the strict interpretation of accountability it is questionable if the man thus composed can be considered responsible for his apparent delinquencies.

I do not think it necessary to refer at much length to the respon-

sibility of patients, upon whom are laid certain obligations which are as binding as those to which we are amenable. The contract between physician and patient, as I have shown, is mutual in its character; and while the former does not seek to avoid responsibility for the proper performance of his acts, the latter, I am sorry to say, frequently evades obligation and conceals his evasions in such a cunning and artful manner as to cause his attendant great anxiety and oftentimes irreparable injury. The principle that should actuate a patient in his efforts to promote recovery from an injury or an operation, as well as from sickness, is based on co-operation with the plan and purpose of the attending physician. The law holds him to this duty as his part of the compact. If from any cause he does not subscribe to the necessary directions of his advisor, but sets up an independent and rebellious will, even while seeming to be governed by the judgment that directs him, and thereby is subjected to unpleasant or unfortunate results, "his neglect is his own wrong or misfortune, for which he has no right to hold his surgeon responsible." The doctrine is founded on wisdom, which declares "that no man shall profit by his own wrong;" and as Dr. Ordronaux adds, "Nor does it matter in what form that wrong manifests itself, whether it consist in negligence, unwillingness or inability to follow the physician's directions, or in a wrongful interference with his treatment for sinister purposes."

The fact has doubtless been vividly impressed upon some among you in the form of a summons, and upon others by reading and observation, that surgeons almost exclusively and physicians rarely have been held to accountability in the charge of malpractice. It is interesting to consider some of the causes that have prompted the selection of one class in our ranks over another, for a measure of responsibility which, I am sure, is as much incurred by the exempted as by the prosecuted portion. If facts could speak for themselves; or, if on a large scale, the errors of physicians could be exhibited in contrast with the faults of surgeons, no one in this audience would rise to declare that the latter deserved to be held responsible, rather than the former, for the consequences of their professional acts.

The allied character of anatomy and surgery, and the direct dependence of skill in the latter upon knowledge of the former, for every operation performed, for every broken bone replaced and adjusted by suitable dressings, and for every dislocation reduced, renders the practice of this branch of science more precise and demonstrable than the interpretation of symptoms in the ordinary

course of disease and the fitting employment of remedies. The manual operation of the surgeon and the results he endeavors to accomplish are so manifest and striking that the most ignorant and unappreciative cannot fail to be impressed by the method that plans and directs the former, and the laudable hope and expectation that wait on the latter. This mechanical feature of operative surgery commends it to the attention of the people as a system akin to the crafts and trades, and the manual dexterity of an operator, while it gains him applause and reputation among the vulgar in or out of the profession, at the same time adds so immensely to his responsibility as to place him in the attitude of a stair-builder or the owner of a steam-tug, directly liable for the consequences of his acts. This, of course, is an ignorant and debased estimate of the actual position of a surgeon and the aim and scope of his duties. It is an estimate which all true surgeons who are sensitive of the honor and dignity of the profession would desire to repudiate as offensive and unjust. Viewed in the light of science, the art and practice of surgery is compromised by the mere exhibition of manipulative dexterity. Men without precise anatomical knowledge, deficient in judgment and discretion, with no moral responsibility of consequences, no thought or care beyond the brilliant display of an operation, are now and then found in conspicuous places as teachers in the schools or offensively pursuing their trade, to the disgust and shame of their more loyal and conscientious associates.

Whether practiced with elevated purpose as a science, or mercenary spirit as a trade, the surgeon engages in a work of acknowledged responsibility, which subjects him to vexation and annoyance, from which his more fortunate neighbor in medicine is entirely relieved.

If the veil that hides the chamber of sickness from the eye and scrutiny of criticism could be lifted, what a record would be revealed of errors committed at the hand of the physician, whose authority and judgment in the character of family attendant are never questioned, but held in the highest reverence and obeyed and believed as if inspired by more than human wisdom!

I will not attempt to point out instances of faulty judgment among my associates in medicine. I am painfully conscious of my own errors and infirmities, and how far short I come every day of reaching that degree of excellence which, though I may strive to attain, seems continually to recede before me.

It is well that our professional lives, in the more privileged field of medicine, are not subject to such an inspection as compels us to give

an exact name to every form and feature of disease and a logical reason for every prescribed plan of treatment, beside being held responsible for the immediate and remote consequences of our oversight and care in the treatment of disease.

As I have already mentioned, members of the legal profession are governed by the same requirements in every particular as those that regulate the practice of medicine. They are held to the same degree of responsibility, and are expected to exercise such care, skill and diligence in advising clients and in the management of causes in the courts as will prove their fitness to practice a profession in which a certain share of learning is considered absolutely essential. A fundamental error lies at the very beginning of legal as of medical pupilage and preparation for the responsible duties of professional life. Education and especial adaptation of the qualities of the mind to the pursuit to be followed are as lightly regarded in one profession as in the other. Hence we see the ranks of medicine and the law filling with young men utterly deficient in that kind of training and preparation which should be esteemed the only proper door of entrance to the mysteries that lie beyond.

Before the passage of the Code of Practice in 1846, the terms of study and clerkship required of a student, in imitation of the English rule, extended over a period of seven years. It was necessary that this long pupilage should be spent in the office of a practicing attorney of the supreme court, whose certificate as to duration of clerkship and proficiency was required before the student could be admitted to examination. The attorney was also called upon to furnish evidence of suitable age and moral character. If the aspirant desired to rise to the grade of counselor-at-law, he was obliged to practice as an attorney three years and be subjected to an additional examination. By a sweep of power, this salutary guard and check against the admission of unworthy and undisciplined men to the bar was abolished, and provision was made that "any citizen of good moral character, upon an examination whenever prepared, and upon being found duly qualified, is admitted to practice in all the courts of the State, both as attorney and counselor."

I refer to this subject for the purpose of instituting a comparison between the methods of admitting attorneys and physicians to practice in their respective professions. Loose and unsatisfactory as are the laws and requirements by which a student in medicine is received in the profession, and deficient, as in too many instances he proves to be in preliminary education; yet more is required of him, even at the

very threshold of his career, than of the pupil in law, because a definite term of study and attendance on two full courses of lectures is prescribed. If the comparison is carried further, the presumption is evident that three years of study under a competent teacher, and attendance upon lectures, affords better preparation for a future of usefulness and intelligence in a profession, than a term of reading, subject to no positive oversight, and with no restriction as to time save the ability of the pupil to pass an examination, by which he is admitted to practice in the courts of the State.*

A question naturally occurs in this connection with respect to the remarkable exemption of members of the bar from the consequences of malpractice, when, as all intelligent men are aware, they would, if subjected to the same legal discipline as that which governs the practice of surgery, be made frequently to respond in damages to their clients for crude and faulty advice, for imperfect knowledge of the law, and for deficient skill, care and diligence in the management of causes in the courts. The accountability to which they are legally liable is sufficiently strict and precise. The sentiment of the fraternity, however, influenced by custom and expediency, is radically averse to holding them to the consequences of their errors, even when sufficiently flagrant to admit of no palliation under the charge of malpractice. The results of imperfect or deformed union of a broken bone bear no proper proportion to the evils which arise from the alienation of an estate under improper advice, or the surrender of rights and privileges, which, with better counsel, might have been preserved and enjoyed.

It does not require a stretch of imagination to comprehend the deplorable effects of hasty and ill-advised litigation in our State. The courts are taxed to the extreme limit of their time and ability to hear and dispose of the cases and questions that come before them. Even with the multiplication of facilities by which cases in the lower courts are carried to the higher, the business of them all is hindered and obstructed to such an extent that serious detriment is done to

* Since writing the above, I have learned that the Court of Appeals, under authority of a law passed by the Legislature in 1871, have so modified the rules for admission to the bar as to require of the pupil "a regular clerkship of three years in the office of a practicing attorney of the Supreme Court, after the age of seventeen years," or "any portion of time not exceeding one year actually spent in regular attendance upon the law lectures in the University of New York, Cambridge University, or the law school connected with Yale College, or a law school connected with any college or university of this State," etc., etc.

Under the encouraging influence of this wholesome rule, at a recent examination of law pupils in the city of New York, twenty were rejected out of a class of thirty. The examiners reported that the ease with which admission is gained to the profession has led, as in the cases before them, to hasty and imperfect preparation, both in the principles of law and their application to practice.

the public, immense cost is imposed upon the State and contestants, the courts, the bar and community are forced to admit either the insufficiency of the system by which justice is rendered, or an amazing and incomprehensible increase of litigious people. From a medical or other stand-point, which lifts the spectator up out of the machinery of courts and gives him a position of independent scrutiny, it would seem as if contest for *principle in law*, in some directions at least, must long since have been settled by such fixed and authoritative judgment and decision as to render the strife of further litigation both unbecoming and unnecessary.

To illustrate: the construction of statutes has opened an illimitable field to the student in law, in which he enjoys an opportunity of reviewing the entire range of jurisprudence from ancient times to Magna Charta, and so on down to the interpretation of the latest enactment of law. And jurists, with power of mind and training adapted to such investigation, go forth on the wide sea of research and inquiry, and come back with grave and learned opinions, in conflict, perhaps, with the decisions of their associates, and falling short of expressing the true intent and purpose of the law which they are expected to interpret. A yet higher court takes up the subject, and after persevering and exhaustive study and consideration, final judgment is rendered, and the fact now appears, that all along in the case, from its inception under legal sanction, on to its slow conclusion, the advice, counsel, skill, care and management of attorneys on the lost or defeated side, exhibit, if not malpractice, at least such faulty and erroneous conduct and superintendence as entail upon a client vexation, disappointment, pecuniary loss and disaster.

In a case to be found in Wendell's Reports, the late Judge Bronson uses the following language, "It was said at Westminster Hall, more than seventy years ago, that the statute of frauds had not been *explained* at a less expense than one hundred thousand pounds sterling; and Chancellor Kent, at the time he wrote his commentaries, thought the same might then be put down at a million and upward."

In view of this sentiment uttered by Judge Bronson, I asked a lawyer of acknowledged experience and wisdom, who occupies an exalted position on the bench, how much it had cost litigants and the State in defraying the expenses of the courts, to settle questions arising under the Code of Practice, where counselors-at-law had erred in the construction to be placed upon it, and his answer was that it would be impossible to state accurately, but it had cost

infinitely more than the sum mentioned by Chancellor Kent, in less than one-half the time.

I asked the same judge if he had ever known a lawyer to be prosecuted for mistakes or misjudgment in regard to the true construction to be given to any law, and he answered that he had not. I then inquired if he had ever known a lawyer to be prosecuted upon the allegation that he did not in his profession exercise ordinary care and skill in conducting the business of his client, and he replied that he had not known such an instance. I further availed myself of the privilege of requesting to be informed how many suits he had known to be brought against members of the medical profession for any of these allegations, and he said he had known a great many, adding that if the same practice which had been adopted in the prosecution of members of the medical profession had been adopted, as against members of the legal profession, it would be impossible to place a limit upon the consequences.

The fact is so apparent as to be confessed and acknowledged without reservation, by the older members of the bar, that malpractice among lawyers is of very frequent occurrence. It is not uncommon, in fact, it is so common as to have passed into a settled custom, for a certain class in the legal profession to seek the aid and advice of their more learned and astute associates, for the purpose of extricating them from the confusion and perplexity in which the affairs of their clients had become involved by reason of the unsound and defective advice and practice to which they had been subjected.

This exhibition of legal malpractice in the aggregate is startling and extraordinary. It is concealed, however, by a tacit agreement to preserve the errors of the profession entirely within itself, and never were the requirements of a brotherhood of interest more zealously regarded.

The immense money value of unnecessary litigation to parties engaged — the great expense borne by the State at large — the additionally oppressive burdens of verdicts and judgments — the costly process of appeal, and the trial a second time of the issue — these are some of the fruits of "negligence in the conduct of business intrusted to him," for which the attorney will be compelled to plead guilty to the charge of malpractice. Other and equally serious results grow out of individual estrangement, jealousy and hatred, disturbance of the peace of communities and of the State, an effort by persistent litigation to unsettle public policy and the development of a spirit of strife among the people.

In consideration of these facts, which are suggestive of thought and reflection, it may very properly be asked, what should be the attitude of the legal toward the medical profession, when both claim to be learned before the world and engaged in the highest interests of the race? Should one profession prey upon the other, not because of superior knowledge, diminished liability, greater virtue or strength of purpose, but because it has control of the machinery by which the process of complaint of malpractice and efforts to convict under the charge, are made to bear with undiscriminating and hateful effect? A great profession, with fame coeval with history, numbering among its illustrious men such names as Blackstone, Sir Matthew Hale, Story and Kent, and a brilliant array such as these, is not to be judged by the reprehensible acts of a few of its followers. I use these words with due caution and speak deliberately when I declare that a suit of malpractice against a member of the medical profession who conscientiously discharges his duty in case of sickness, an accident or a surgical operation, is a violation, on the part of an attorney, of moral obligation, as culpable as it is oppressive and vindictive. Continually subject to the same charge of malpractice, and escaping its legal consequences through the charity of the bar and the bench, and the credulity and ignorance of the people, it would seem as if consciousness of his own professional failings and imperfections would prompt him to be considerate of the alleged faults and errors of the medical profession.

I am reminded, in this allusion to the ignorance and credulity of the people in regard to the subtlety and mystery of the law, and the exemption of an attorney from responsibility for the results of faulty and injurious advice, to a sentence or two in a work recently published in London, as follows: "The very small place filled by our own English law in our thoughts and conversation is a phenomenon absolutely confined to these islands. A very simple experiment, a very few questions asked, after crossing the channel, will convince you that Frenchmen, Swiss and Germans of a very humble order have a fair practical knowledge of the law which regulates their every-day life. We in Great Britain are altogether singular in our tacit conviction that law belongs as much to the class of exclusively professional subjects as the practice of anatomy." (*Henry Sumner Maine.*)

But what shall be said of an attorney who advises a suit of malpractice against a physician and conducts its management in court, under an implied agreement that if he does not succeed in obtaining judgment, his services shall be gratuitously rendered; but if a verdict

is found for his client, he will retain one-half or some other specified sum as his share of compensation! If such a course is not the most flagrant malpractice, it would be difficult to conceive of an offence that would justify a more pointed use of the term. It is more than malpractice; it is an attempt to extort money, by inducing a jury to believe that injury has been done to a client, that pecuniary advantage may accrue to his attorney. It is virtually, by the terms of the agreement entered into, placing the attorney in the position of the party on whom the alleged malpractice has been visited. It is an act of professional piracy that merits the scorn and execration of the bar, as it does the contempt of all good citizens, and that should subject the offender to the discipline of the courts and the forfeiture of his privilege longer to practice in them. The same obloquy should attach to an attorney who brings an action of malpractice against a physician with the expectation that it will not come to trial, but, for fear of expense and annoyance, will be settled by the defendant for such a sum of money as will prove satisfactory, not to the plaintiff actually, but to his cunning and unprincipled adviser.

Mischief-makers, such as I have mentioned, are to be found in the ranks of our legal brethren. They are excrescences that disfigure the commanding proportions of jurisprudence and cause it to appear hideous and unnatural; or, like barnacles collected on the hull of a noble ship, in spite of the nice mathematical construction of the vessel, its trim masts and spars and spread of canvass, its speed and effectiveness are materially diminished, and it is compelled to labor under the disadvantages of degeneracy and decay fastened upon its own body.*

"Jeremy Taylor lays it down as a rule that all advocates must deal plainly with their clients, and tell them the true state of their case." Quoting from the same source—Lawyer and Client; Their Relations, Rights and Duties. By Wm. Allen Butler, Esq.—these appropriate words occur: "Many a client would be saved time, temper, peace of mind, money and reputation, were he advised at the beginning, what he so often discovers at the end of a lawsuit, that he has no defence to a debt which he owes, or that he has no remedy for the wrong which he seeks to redress." Another authority, John Livingston, Esq., Law Magazine, says, "It must be

* A Quiet County.—Noble county, Ohio, with a population of 20,000 people, is well worthy of the name it bears. There is not a saloon in the whole county, there is not a case on the criminal docket, and not a person has been arrested for a whole year on a criminal charge. There were only five lawsuits last year, and if it hadn't been for a meddling lawyer, three of these would not have been recorded. (*Detroit Free Press.*)

remembered that if lawyers were never to give way to loose and careless practice, the term *sharp practice* would be almost unknown ; and if the regulations which the Legislature and the courts have laid down with so much care were more uniformly studied, and steadily followed by those whose *chief duty it is to act according to law*, far fewer charges of professional misconduct would be heard of." Mr. Butler, quoted above, says : "The law is for the redress of wrongs ; it is never their cause. The stirring up of lawsuits has always been under the ban of a just public opinion, and the purchase by lawyers of causes of action is included in the censure. It is repugnant to the genius of the law, and to the sound moral sense of men, and has been repeatedly the subject of express statutory prohibition. The jurisprudence of civilized States condemns and forbids it."

Strongly as we are inclined to reprehend the acts of certain lawless members of the legal profession, in justice to the profession, as a whole, we are bound to yield to its followers such honor and independence as betoken a proper appreciation of the underlying principles of law and a just sense of courtesy extended to us, as from one body of learned men to another.

Suits of malpractice would be rare indeed if a client and his attorney were the only elements that enter into their conspiracy of conception, preparation and management. The assistance of a third party is indispensable to the birth of the monster, and the wicked alliance is made complete by the presence of a member of the medical profession. This must be spoken to our shame and mortification. In all the cases of malpractice that have fallen under my observation, physicians having authority to practice, or men presuming to be physicians under the sanction of loose laws, have been instrumental in urging on the odious prosecution. I will not attempt to analyze the motives of these traitorous men. They are such as would prompt the defamer of character to asperse his neighbor without cause, or the confidential clerk to betray and rob his employer, or the physician who has become the custodian of family secrets to retail them in the gossip of social life or spread them to the world through the agency of the witness-stand.

The fellowship of the bar is much more in accordance with a sentiment of brotherhood in this respect, and, as I have shown, the errors and shortcomings of its members remain concealed under the semblance of charity and forbearance, which, like a broad garment, envelops the entire profession. A common interest governs the legal profession to a greater degree than that which directs and controls the

operations, either fundamentally or experimentally, of the science or art of medicine. The principles of law are founded in justice, based upon elements of divine truth and equity. The principles of medicine are the production of human agency, subject to individual interpretation, the construction of succeeding eras of investigation and conflicting schools of thought. Codes of ethics cannot bind our profession everywhere more than codes of learning.

We may pertinently inquire what is the present position of the medical profession in view of the charge of malpractice, based on the latest ruling of law and the most enlightened construction of our responsibility, gathered from published reports of adjudicated cases? While the principles of law remained unchanged, the custom of the courts had undergone very little modification of the course usually pursued in the management of suits of malpractice, until in November, 1868, in *Walsh* v. *Sayre*, Judge Samuel Jones, of the Superior Court, in the city of New York, rendered a decision which created a profound sensation in legal and medical circles. That this decision is not a step simply, but a flight toward reform; in other words, reform, in itself, of a system or custom which bore with hardship and unfairness on a physician in an action for malpractice, liberal-minded men in each profession will gladly affirm. It has established a precedent which will be so generally adopted by the courts as to become a settled policy in all cases of a like character. It gives to the profession that which had never before been conceded, that a personal inspection by experts can be made to supersede the interested and prejudiced testimony of medical and other witnesses who strive to accomplish the conviction of the defendant. It gives to a physician charged with malpractice an opportunity to show, to men worthy to be called his peers, whether or not errors have been committed, or due skill, care and diligence exercised in the treatment of a particular case. The application of this rule takes away from the trial of a suit of malpractice nearly all the dread which medical parties experience in prospect of rebutting the allegations of the plaintiff and the testimony of his adherents. Judge Jones has so conspicuously advanced medical jurisprudence by his ruling in this case, that he is entitled to the warmest praise and gratitute of educated members of our profession and the profession which he illustriously represents.

Before judicial authority, we have no reason to apprehend the consequences of our professional acts. The views of a partisan advocate are not the sober and deliberate views of a judge sitting on the bench. In assuming the ermine he lays aside theory and specu-

lation, and puts on the matter-of-fact principles of law, by which he will be directed through all his judicial life. He knows our accountability as medical men just as he knows the liability of the members of the bar, who are never out of his sight. If our alleged errors could be investigated by him alone, without the intervention of a jury, we would never feel in doubt of the issue. Our vexation and annoyance would consist merely in being sued and in collecting testimony and making up a defence. But the ordeal of a trial by jury has to be met. Questions of fact are to be weighed and judged by men who are in no manner qualified, as juries are commonly composed, to decide in matters affecting the rights and responsibilities of physicians. Esteemed as trial by jury may be regarded in the practice of the courts in ordinary civil suits, it is defective and oppressive when applied to the charge of malpractice. Guided and governed by such positive instruction from the court as to forbid the manifestation of passion, prejudice or ignorance on the part of a jury, our rights may be considered really safe in their hands. The wholesome authority of the court, however, must be exercised to prevent juries from being led away by jealousy of a profession or of educated men to judge vindictively rather than impartially in matters committed to them.

Men of conspicuous ability have been driven from the profession through fear of being held to responsibility for the consequences of surgical practice. With love of science, and endowed with skill and knowledge to take a commanding position in medicine, they have been impelled by a desire of self-protection to avoid the annoyance and pecuniary sacrifice which its daily requirements impose upon them. After years of faithful devotion to duty, and the realization of the products of toil and labor, with which to educate children or to comfort the decline of life, the inexorable verdict of a jury has despoiled such men of their goods and substance, and reduced them to penury. Not to establish a principle, not to vindicate the dignity and honor of the law, nor for the purpose of teaching physicians a lesson of obedience to the responsibilities of their calling—but simply for the hateful object of obtaining vindictive damages under cover of strict legal accountability.

More than twenty-five years ago, my honored preceptor, Dr. Alden March, was sued for malpractice, in consequence of an operation for strabismus, which terminated in such opacity of the cornea as to produce nearly total blindness in one eye. Damage was claimed to the amount of ten thousand dollars. After an exceedingly perspicuous

charge by Judge Amasa J. Parker, in which the liability of physicians was laid down at length, the subject was submitted to a jury, who stood, on the first count, eleven for conviction and one for acquittal. "Why," said the dissenting juror, "do you take such ground, in opposition to the evidence and the law of medical responsibility, as explained by the court?" "Because," was the reply of one of the eleven anti-rent communists, "Dr. March is rich and the plaintiff is poor." By persisting in his position until hunger, thirst and other physical necessity, rather than mental or moral conviction, constrained his associates, a verdict of acquittal was rendered. Nothing but the inflexible will, and by comparison the measureless distance, as regards intelligence and appreciation of justice between one juror and eleven others sworn to discharge a specific duty, saved an illustrious surgeon from the consequences of *trial by jury*.

In another case, tried in Broome county, in which damage was claimed, because of shortening and lateral deflection of a limb, due to the conduct of a patient, in the treatment of fracture of the tibia and fibula, a juror inquired of a medical witness if he thought, when the leg regained full strength, the bones would grow out to their original length? Of course judgment was given against the defendant.

In Chemung county, an agricultural juror, after vainly striving to urge upon his companions his own impressions of medical responsibility rather than the law as expounded by the judge in his charge, requested to have the jury brought in court, that he might discuss the matter with that official. This being done, he deliberately drew from his pocket a paper, from which he proposed to read eight objections to the charge of the court in respect to the legal accountability of physicians. With great dignity of bearing, apparently undisturbed by the extraordinary proceeding, the court informed the juror that when, in the course of events, he should be raised from the jury-box to sit on the bench, and the speaker was made to occupy a place among the jurors, he might very properly read the eight objections referred to. "But until that time arrives," the court added, "you must receive the law as I have given it to you." Unabashed, the irrepressible juror informed the court that he also differed from one of the medical witnesses, Dr. Alden March, in some matters of surgical practice. With the remark, "the court is not competent to discuss questions in surgery," the jury was again sent out to deliberate on a verdict. In a few hours they returned, unable to agree, standing eleven for acquittal and one for conviction.

It is unnecessary to state that the agricultural jurist proved to be the non-agreeing juror.

In view of all that has been said, it may be asked what is the remedy for medical malpractice? In respect to the profession of law, we cannot appropriately suggest any method by which the mental or moral condition of certain of its representatives can be changed. We cannot exact or enforce compliance with the requirements of a fixed standard of legal etiquette, much as such a measure of reform is needed. We can only hope that the revolutionary system which threw down the barriers of educational preparation by which the profession was attained, and made access free to all who are able to conform to the reckless provisions of the statute, by the very evils which it has been the means of introducing, will work out such a plan of purification and improvement as will cause a return to the better days of theory and practice in law. Enlightened and conscientious devotion to the interests of a profession, whether of law or medicine, is not to be expected as a product of hasty and ill-advised preliminary and office pupilage and training. It can only come by the elevating influence of education, not as a matter of course acquired in schools and colleges, and by patient and systematic study and investigation. A learned lawyer is a safe advisor. A learned and scrupulous counselor would scarcely bring his mind to the conclusion of recommending a suit of malpractice against a faithful physician.

The remedy for malpractice, as it affects our profession, depends upon a single word, which has so often rung in our ears through the better class of medical journals, through the reports of committees in medical conventions, and through special essays, that we have become indifferent to its importance. The necessity of a higher, more uniform and comprehensive plan of education among medical men is so apparent in this connection, that it seems a superfluous task to refer to it. Not that education will save physicians from the risk of being prosecuted for alleged malpractice. I have discussed this feature of the subject, and have shown that skill and knowledge are not shields against the attacks of the mercenary plaintiff and his legal advisor. Skill and knowledge, however, lift the physician up out of lower into higher planes of thought, and impose attributes of moral and intellectual character, which are the legitimate fruits of the educational system. The proposition may be safely stated that a more thoroughly cultivated and educated profession would materially lessen the frequency of suits of malpractice by taking away that element to which

allusion has been made, which lends its counsel and assistance in the inception and progress of the case. A low and faulty standard of medical education, which barely allows a pupil to pass an insufficient examination, apparently to comply with the requirements of law, which are purposely and ingeniously evaded, is to be charged with this result. A class of men not only ignorant, but with blunted moral sense, is thus permitted to enter the profession by a door whose breadth permits them to find ingress in such numbers, that they exert a wide-spread and damaging influence as well on their better qualified associates as on society at large. Medicine, with them, is an ignoble trade. It sanctions a bargain to produce abortion; it leagues itself with a disaffected patient and a willing attorney to concoct against a fellow-physician an action of malpractice; it prepares evidence to sustain the alleged charge, and appears as chief witness in the prosecution. It poisons popular sentiment by every device peculiar to cunning and unscrupulous conduct, and, by cultivating the society and fellowship of illiterate and prejudiced men, it arrays one class in community against another, and thus disturbs the public peace.

This is not an overdrawn estimate of the consequences of loose and precipitate medical education. It presents a small portion only of the evils of imperfect preparation for the practice of our art.

With the profession rests the power to accomplish a reform of the system of medical education; such a thorough reform as will extend throughout the nation. Some among you, I know, have pictured to yourselves an ideal standard of preparation for the profession, including the processes by which a pupil is carried through the stages of growth in medicine to the possession of his degree, and so on to the higher positions to which his qualifications give him access. Through much strife, opposition and discouragement, such a change is surely coming. Not in your day, nor in mine, but in that future which awaits the greater development of our country, disenthralled medical science will stand conspicuously forth as teaching given from God.

AN ADDRESS

READ AT ALBANY, FEBRUARY 6, 1872, AT THE OPENING OF THE

Sixty-Sixth Annual Session of the Medical Society of the State of New York.

By WILLIAM C. WEY, M. D.,
PRESIDENT OF THE SOCIETY.

Gentlemen of the Society:

We are again permitted to gather in this ancient capital to celebrate the sixty-sixth anniversary of our honored Society. Animated by a spirit of progress, with augmented numbers, with increased reputation, with improved means for utilizing the multiplied suggestions, revelations and discoveries in our art, this yearly assembling of ourselves together has become an event of significant and absorbing interest to a large number of devoted men in every portion of the State.

The age and character of this Society, its achievements in science, as exhibited in its published volumes, which compose a library, and its recognition at home and abroad, attest the wisdom and learning of its founders and the zeal and devotion of their successors in the fields of knowledge and research which for so many years they have assiduously cultivated.

The immediate and remote effects of medical fellowship are illustrated by the history of this Society. Insensibly, but with great power, it has exercised its influence upon every section of the State. It has so materially elevated sentiment in remote districts, under the form of combination among medical men, even though few in number, that the greater and more enlarged interests of the profession have been conserved and perpetuated. An element like a medical organization, regularly and earnestly sustained, has so often proved

the means of resisting error among the people, of inducing obedience to the standard of ethics and doctrine, and of individual profit and advantage to its members, that its value cannot be adequately estimated.

No one who has observed the evidence of medical growth and strength will question that incalculable good develops out of professional intercourse that has passed beyond the technicalities of constitutional amendments and the alteration of by-laws, and attained a condition that savors absolutely of legitimate scientific improvement. The fact has been repeatedly demonstrated in a survey of the medical societies of the State, that the provisions of the Code of Ethics are most faithfully and conscientiously observed, and the personal standard of character ranks highest in those counties and organizations in which active, hearty fellowship is maintained. I may add respecting the Code of Ethics adopted by this Society, and antedating all other American codes, which in some quarters has been ridiculed and despised as effeminate and circumscribed in its teaching, that it is grounded upon a basis of morals which comprehends and illustrates the golden rule, and embraces in its scope an epitome of Christian teaching.

To such an extent am I persuaded of the necessity of a more enlarged and specific knowledge and understanding of the ethics of our profession, that I would gladly see the whole subject made a branch of medical teaching in the schools, as a positive and necessary part of the means of education of the student.

According to the methods of instruction now practiced, inspiration of honor and character may be communicated to a pupil through the daily consistent walk and conversation of his preceptor. This ideal of excellence may be carried through the period of instruction and be incorporated in the professional life of the student, and it is a noticeable fact that if his former educational advantages have been liberal, his perception and appreciation of medical ethics will be immeasurably increased. On the other hand, if without previous preliminary preparation, his early life has been devoted to practical rather than educational duties, and if it be his misfortune to pursue his studies under the training of a physician whose aim and purpose is to procure business, regardless of the manner in which it is obtained, it is easy to see how, at the very beginning of his career, he is made to acquire false views of morality, honor and professional decorum, which subsequent lectures and instruction are in no way calculated to remove.

In the first case, the student, by reason of adequate education

before taking up the study of medicine, is instructed in elements which, under proper direction, will produce the full development of professional character and learning, and, as a natural consequence, a jealous estimate of the ethics by which he is to be governed in his intercourse with his associates and patrons.

In the other instance, the whole subject of medical ethics remains a sealed book to the pupil, simply because his former life tended in no degree to prepare him for its comprehension. It was not illustrated, except by violation, and as a matter of course, during his term of study, and received no explanation or illumination in the ordinary lecture term of a medical college.

Considering the importance of this subject, in comparison with many upon which much time is spent in medical colleges, its present and remote bearing on the pupil, on the profession at large, and on the public generally, I cannot but hope that it will ultimately receive the earnest attention of educators, so as to become an incorporated feature of teaching in the schools.

The tardy publication of the Transactions of this Society calls for some action at your hands. This evil, under the immense pressure of the printing and publishing engagements of the State, is yearly growing more and more serious. The edition of Transactions for 1870, as you are aware, was entirely consumed by fire in February last, just as it was about being distributed by the publishers, more than a year after the session of the Society. At the meeting in 1871 but two or three copies in sheets could be obtained for the use of the officers of the Society. The Transactions for 1871 will not be forthcoming for many weeks.

But for the modification of an arbitrary rule, made a year ago, giving the authors of papers contributed to this Society an opportunity to publish them in medical journals or in pamphlet form, the delay in the appearance of the Transactions would serve as a means of limiting or preventing the preparation and introduction of valuable articles by the members of this organization. This would especially be the case in respect to new and original matter, which it might be important to bring promptly to the attention of the profession. If compelled to take the fate of the published Transactions, the value of a paper would be entombed more than twelve months. The saving permission to publish elsewhere, redeems it from the evils of such sepulture.

At its organization, and for many years thereafter, this Society was limited in membership. Attendance at its sessions was confined to

members and delegates living in the near neighborhood of Albany. The season of the year and the difficulty of travel rendered it impossible for members of the profession residing from fifty to one hundred miles from the capital to be present at the annual meetings. Physicians in the northern, western and south-western limits of the State were as distant in time from Albany, in midwinter, during the first twenty-five or thirty years of the existence of this Society, as we are now from the western territories.

I believe the period has arrived for inaugurating a complete and radical change in the manner of publishing our Transactions. Two or three methods might be proposed.

If it is in accordance with the provisions of law, the Legislature might be asked to appropriate a sufficient sum each year to allow the publishing committee promptly to present the Transactions to the Society, in an inexpensive but neat and attractive form, and free from the inaccuracies and blemishes of type and paper which have so compromised their appearance. Competition among publishers would reduce the price of printing, and improve the typographical excellence of the volume.

As regards the treasury of the State, as long as the commonwealth assumes the responsibility of paying the cost of publication, it would seem to be a matter of very little importance whether it is done by specific appropriation, or in the usual course of compensating the State printer. By one mode the volume will bear the impress of individual enterprise, and will be presented in such dress as will reflect credit on the Society and the skill and art of the printer. By the other it will come to us in poor paper, with many errors, and representing the art of printing when the Society was in its infancy.

Another method would suggest that the Society should be altogether independent of State control, in the matter of publication. A fund should be secured from the Legislature, if possible, the interest of which would defray the cost of printing. This sum should be invested in such a way as to yield an adequate amount for the object contemplated, and the printing should be supervised by a suitable committee, without regard to the State printer, unless he should feel disposed to enter into competition for the work under certain restrictions.

A third plan consists in raising money in the Society for the actual expenses of its yearly sessions, including the publication of its Transactions. This plan is commendable and at the same time practicable. It may require constitutional changes to authorize a demand to

be made upon county societies, the New York Academy of Medicine and medical colleges actually represented, for a certain annual or biannual amount, according to size and delegation, and increased contributions from delegates and permanent members. This Society is so large that it can afford to be quite select if such demands are not promptly and willingly paid. Individual donations might also be solicited. My impression is that in no case of county organization, county representation, medical college or election to permanent membership, will any scruple be felt toward responding to the assessment of the parent Society.

This question should be carefully considered by a competent committee, and a report presented at the present or at a subsequent meeting of the Society.

Several weeks since, I addressed a letter to the Surgeon-General of the United States Army, apprising him of the time and place of meeting of the Society, and inviting him to designate one or more members of the medical staff stationed within the limits of our State, to be present during the session. It seemed not only proper but just, that representatives of a branch of medicine in which some of the most brilliant and extraordinary discoveries in special science have been recently made, should be honored by being asked to sit with us in council and take part in our deliberations. In a very courteous reply, the Surgeon-General concluded as follows: "I shall be glad, at the proper time, to convey your invitation to one of the medical officers of the army on duty within your State, should the then condition of the service permit."

I would respectfully recommend that a committee of members, residing in this city, be appointed to petition or urge upon the commissioners of the capitol the propriety of assigning to the uses and purposes of this Society in that building, rooms in which to hold its annual meetings and for the deposit and preservation of its papers, records, volumes and other property. The immense capacity of the proposed structure will readily enable the commissioners, at the suggestion of the committee, to perfect an elaborate and appropriate hall, in which the Society, the growth and emanation of the Legislature, and shielded by its authority, may in perpetuity enjoy the comforts and privileges of a settled home.

A spirit has been manifested, where we would not have looked for evidence of such disregard of the obligations of professional obedience and discipline, to cut short the process of investigation of preferred charges against a member in a properly qualified medical society, by

an appeal to the civil courts to restrain the course of the inquiry by a summary injunction. Such a procedure is subversive of morals as well as justice, and effectually puts an end to all attempts to enforce compliance with the salutary rules by which voluntary and chartered organizations are sustained and perpetuated. It strikes at the very root of authority, by first assuming to be loyal and subject to discipline, and afterward rebelling against its power in a way so treacherous and cowardly, that but one course is left for a society thus compelled to yield to the interference of the officer of the law, and that is promptly to expel the revolutionary member; or, if prevented by additional legal hindrances, to cease to hold social or professional relations with him.

I would press upon you the necessity of vigorously urging the Legislature to pass a law to compel the plaintiff, in case of alleged malpractice against a physician, to file a bond of indemnity for the reimbursement of his adversary in costs, should he fail to obtain damages against him. This subject was noticed by an appropriate resolution passed at the last session of the Society, but the Legislature gave no heed to it.

As at present constituted, the law appears to offer inducements to irresponsible and unscrupulous men to bring suit for alleged medical malpractice, for the sake of effecting costly compromise, or to compel a defendant to submit to the expense and injustice of a trial. As is well known, malpractice suits are nearly universally brought by men as deficient in property as in character. A single spirit prompts the action, and that is a prospective money recompense for alleged physical disability, the result of accident and surgical treatment.

If a law, such as has been proposed to this Society, is passed by the Legislature, we shall see how promptly and effectually a check will be put on the prevailing tendency to hold medical men responsible for the consequences of surgical practice, especially in the treatment of fractured and dislocated bones.

I refer to the condition of medical literature in the State with peculiar pleasure. This remark applies as well to the journals as to the publication of original matter in the shape of extended volumes on special topics. Medical journals devoted to the general purposes of the profession, and those advocating particular departments in our art, are so ably conducted by educated physicians, so enriched by contributions of the highest order from progressive, representative men, so full of the results of research and investigation in all the fields of practical and scientific thought and inquiry, so greatly in advance of

the last decade, and so fresh and glowing with the enthusiasm of a great cause, that it is a source of common pride and praise to utter a word in their behalf.

The conservative and substantial book literature of the profession is yearly becoming more and more noticeable and important. So many valuable additions are being made to our stock of standard authorities by hard-working and patiently investigating men, whose names are familiar as instructors and practitioners of eminence, that at home and abroad the reputation of the State of New York is well established among authors and students. I will not particularize when so great a number of elaborate works on specific subjects have been issued from a prolific medical press during the past five years, or even in the course of the preceding twelve months. Minute investigation of an exhaustive nature, in the hands of earnest men, is working out the positive and beneficent results which are sure to follow ardent and continuous devotion to particular lines of study.

It remains to allude to the only sad feature of the year of the Society since we last assembled. Five permanent members have died: Dr. Barent P. Staats, of Albany; Dr. Andrew Van Dyck, of Oswego; Dr. Erastus L. Hart, of Elmira; Dr. Henry D. Buckley, of New York; and Dr. Darius Clark, of Canton. Drs. Staats and Buckley were present at the last session. Suitable notices of these eminent men will be contributed for publication in the Transactions of the Society.

With the hope that the fruits of this session may be peaceful and profitable, and that it may be well for us to come together in counsel, in the name and for the purposes of science, I have the pleasure of announcing that the Society is prepared to proceed to the discharge of business.